IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR.JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

TUESDAY, THE 7TH AUGUST 2007 / 16TH SRAVANA 1929

AS.No. 389 of 1991(D)

OS.1/1981 of PRL.SUB COURT,TRIVANDRUM
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APPELLANT: IST DEFENDANT

K.S.GOVINDAN NAIR, DEVI VILAS,
ATHIYANNOOR, NEYYATTINKARA.

BY ADV. SRI.P.GOPALAKRISHNAN NAIR

RESPONDENTS: PLAINTIFF

INDIAN BANK, BALARAMAPURAM BRANCH,
TRIVANDRUM, REP.BY ITS ASSISTANT
GENERAL MANAGER AND POWER OF ATTORNEY
SRI.H.RAMANATHAN, INDIAN BANK, MADRAS.

BY ADV. SRI. SRI.M.BALAGOVINDAN
SRI.S.EASWARAN
SMT.SIBY.P.JOSE
SRI.G.S.RAGHUNATH

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 03/07/2007, THE COURT ON 07/08/2007 DELIVERED THE FOLLOWING:

Kurian Joseph & T.R. Ramachandran Nair, JJ.

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A.S.NO. 389 of 1991

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Dated this the 7th day of August, 2007

JUDGMENT

T.R. Ramachandran Nair, J.

This appeal is filed by the first defendant in O.S. No.1/1981 of the court of the Principal Sub Judge, Thiruvananthapuram. The plaintiff in the suit is Indian Bank, Balaramapuram Branch, Thiruvananthapuram District and the suit is one for recovery of money. As per the decree, the recovery of Rs.7,55,519.62 with interest on the principal amount at the rate of 12% per annum from the date of suit till realisation has been allowed. Earlier, by judgment dated 25.7.2002 a Division Bench of this court had allowed the appeal and remanded the matter to the trial court for fresh disposal in accordance with law. This judgment was challenged by the Bank in Civil Appeal No.7555/2004 (arising out of S.L.P. (Civil) No.2483/2002). The Hon'ble Supreme Court reversed the judgment of the Division Bench and the matter has been remanded back to this court for disposal of the appeal on its merits. Accordingly, the appeal has been reposted for hearing.

2. Altogether there were five defendants in the suit and the appellant herein alone has preferred this appeal. The other defendants are not arrayed

as respondents in this appeal also.

3. The first defendant is the proprietor of M/s. Kavitha Match Factory and the second defendant in the suit is the proprietor of M/s. Kavitha Match Industries. The transactions in question relate to the financial assistance made available by the Bank in the nature of open cash credit, medium term loan and cheque B.P., overdraft accommodation, etc. Recovery was sought on the ground that a consolidated amount of Rs.7,55,519.62 is due to the plaintiff from the defendants as on the date of the suit.

4. The plaintiff is a nationalised bank. The case of the plaintiff in a nutshell are the following:

5. On 3.11.1973 the first defendant/appellant was allowed an open loan cash credit to the extent of Rs.20,000/-, a medium term loan of Rs.30,000/- and also cheque B.P. for an amount of Rs.10,000/-. He had executed three promissory notes for the above three transactions on the same day, apart from executing other necessary documents. Defendant No.2 onwards are co-obligants in the transaction. When request for additional financial accommodation was made by him, the same was sanctioned by the Head Office of the bank as per sanction order dated 20.12.1974. An amount of Rs.20,000/- was drawn by way of additional loan on 13.3.1974

after executing a demand promissory note. The other defendants are co-obligants to this transaction also. A further overdraft accommodation was availed by him on 24.6.1975 for an amount of Rs.15,000/- by executing necessary documents and demand promissory note. It is revealed from the plaint that on 22.6.1976 a further amount of Rs.15,000/- was availed as open cash credit after executing a promissory note. This is followed by additional open loan cash credit availed on 12.12.1978, that too by executing a promissory note, necessary agreements, hypothecation of stock in trade, etc. It is the case of the plaintiff that renewal promissory notes along with covering letter have been executed by him on the dates mentioned in the plaint. The amount has been secured by providing equitable mortgage of immovable properties also. Ultimately, as on the date of suit, an amount of Rs.2,54,861.37 is due to the plaintiff under the above transaction.

6. Similarly, the second defendant was allowed financial assistance of various amounts by way of medium term loan, open cash credit and cheque B.P. The method of executing promissory notes, execution of renewal promissory notes along with covering letters, hypothecation of immovables and stock in trade, plant and machineries, etc. are also evident in the above transactions, going by the plaint. The other defendants along

with the deceased mother of second defendant are co-obligants to this transaction. Ultimately, it is averred in the plaint that an amount of Rs.5,00,658.25 is due from the defendants under the said facility. With an intent to create an equitable mortgage, the defendants have deposited the title deeds in respect of the plaint properties after executing memorandums evidencing the deposit of title deeds. These two transactions have been consolidated in the suit as there is a common security and as the co-obligants are the same.

7. The defendants 1 to 5 have filed written statements. In the written statement filed by the appellant herein, he has averred that because of the misuse and misapplication of sanctioned amounts he received only a meagre amount to run the match factory. As a result of this, according to him, the working capital available was only to the tune of Rs.13,365.82. He disputed the liability as reflected in the plaint. It was also submitted that the renewal documents regarding the promissory notes and covering letters have been prepared by the bank on signed blank forms submitted by him earlier and they have been unilaterally created to escape from the bar of limitation. It is also contended that there is misjoinder of causes of action. Defendants 3 and 5 also, in their written statement contended that the suit is barred by limitation and that the promissory notes were not renewed by the defendants

and at any rate, there are no renewals within the period of limitation. The 4th defendant had also filed a separate written statement.

8. The court below framed 13 issues. P.Ws.1 and 2 have been examined for the plaintiff and Exts.A1 to A120 have been marked in support of their case. For the defence, DW.1 was examined and Exts.B1 to B9 were marked.

9. Learned counsel for the appellant argued that various promissory notes are barred by limitation and hence his client is not liable for the plaint claim. It is submitted that a cheque for an amount of Rs.42,500/- was sent for collection on 9.5.1974, but the same was credited mainly in the account of Kavitha Match Industries. This is unjustified and therefore since the amount has not been adjusted in his account, the total amount claimed in the plaint as due from the first defendant is not correct and as this is an important aspect affecting the claim of the plaintiff, the amount claimed in the suit varies and the suit is liable to be dismissed on that score. Apart from that, it is pointed out that amounts covered by certain fixed deposits have not been refunded/adjusted and hence the plaint claim is unacceptable and at any rate, the court below was not right in decreeing the suit as prayed for. According to the learned counsel, once these transactions makes a difference on the statement of accounts which led to the quantification of

different claims in the plaint, the suit ought to have been dismissed as the plaintiff has not been successful in proving that the amount claimed in the plaint is the correct one. The appellant has filed an affidavit along with I.A. No.1371/2007 explaining these facts and identifying the promissory notes which are barred by limitation. As per the affidavit the only amount as due to the bank as on 31.12.1980 from the appellant is Rs.34,503/-. The above arguments have been refuted by the learned counsel for the Bank.

10. One of the points raised by the learned counsel for the Bank is that the appeal is filed only by the first defendant in whose case the balance amount was Rs.2,54,861.37. The other defendants are not parties before this court either as appellants or as respondents. In the valuation column of the memorandum of appeal what is stated is that Rs.2,54,861/- is found to be due from the appellant and hence he cannot be allowed to argue on the liabilities in regard to the loans sanctioned in favour of the other defendant

11. Learned counsel for the appellant objected to this argument stating that such an objection cannot be sustained at all. The main argument raised by the counsel for the appellant is in relation to the promissory notes, several of them according to him, are barred by limitation. The learned counsel pointed out that the transactions in question started by the sanction of open loan cash credit on 3.11.1973 along with a medium term loan and a

cheque B.P. Three promissory notes of Rs.20,000/-, Rs.30,000/- and Rs.10,000/- were executed on that day. It is argued that the suit was filed in the year 1981 and even in respect of the promissory notes executed in 1973, 1974 etc. the details of which have been further stated by him in the affidavit filed along with I.A. No.1371/2007, it can be seen that they have been executed on various dates from the years 1973 to 1976 and hence the suit which was filed in 1981, is clearly barred by limitation. According to the learned counsel, the case of the plaintiff for execution and renewal promissory notes along with covering letters cannot be accepted as the bank has utilised blank papers signed by him for the said purpose. It is therefore submitted that the view taken by the court below on issue No.2 calls for interference and if that be so, the plaint claim is not a true and correct one and the suit can only be dismissed.

12. We find that court below has raised a specific issue on this point. The evidence adduced by the bank shows that the first defendant had executed renewal promissory notes along with covering letters, viz. Exts.A3, A4, A5, A6, A9, A10, A11, A12, A15, A16, A17, A24, A25, A26, A27, A31 and A33. The covering letters and promissory notes have been executed by the first defendant along with others. A perusal of the renewal promissory notes and covering letters shows that they have been executed

within the period of limitation and all such renewals acknowledge the liability. The covering letters specifically shows that renewal of the previous promissory notes executed along with the covering letters is in renewal of the previous promissory notes and the newly executed promissory notes are fresh ones as security for the balance due on the various amounts in question. Thus, fresh promissory notes have been executed within the three year period on various dates and till the filing of the suit, they have executed such documents in respect of each one of the original promissory notes. Therefore, it is a case where fresh promissory notes have been executed and the recitals in the covering letter will amount to acknowledgment of the liability. It may be pertinent to note that the suit is not based on the amount reflected in the original promissory notes. But it is clearly stated in the plaint that the first defendant had executed fresh promissory notes in respect of each one of the amount along with other defendants regarding the transactions in respect of the first defendant's establishment. As regards the loan transactions with the first defendant, it has been clearly averred in the plaint that the claim is based on the true statement of accounts and the balance due as on that day on the account of the first defendant. The evidence thus adduced by the plaintiff bank will show that the claim in the suit is not rested upon the original promissory

notes executed by the parties. Since fresh promissory notes have been executed in respect of the amounts reflected in the original pro notes and the liability to pay interest is also reiterated in them, the contention that the claim is rested upon the pro notes which are barred by limitation, is not correct. The court below has clearly found that renewal promissory notes have been executed by the first defendant and additional financial accommodation have been availed on various dates by entering into similar transactions. There are sanction orders, various promissory notes and subsequent agreements executed by the first defendant specifying the rate of interest which he is liable to pay under various accommodations. The same have been accepted by the other defendants also. All of them have agreed that they will pay enhanced rate of interest as and when the same has been increased by the Reserve Bank of India. It is clear from the various promissory notes executed that fresh promissory notes have been executed from time to time by the first defendant along with covering letters reiterating the liability. Therefore, they will constitute a valid acknowledgment of liability. Ext.A2 promissory note is dated 3.11.1979 for Rs.30,000/-, Ext.A4 is dated 20.6.1979 and the covering letter Ext.A6 is also dated 20.6.1979. Similarly, Ext.A10, A16 and A25 promissory notes are dated 20.6.1979 and covering letters Ext.A12, A17, A26 and A27 are

also of the same date. Ext.A31 renewal promissory note and covering letter Ext.A33 are dated 16.6.1978. Ext.A35 is the promissory note dated 27.12.1978. The suit was filed on 1.1.1981, within three years from the date of acknowledgment of renewal of the promissory notes. Apart from that, the loans have been secured by creating equitable mortgage by deposit of title deeds. The suit is filed within 12 years from the date of execution of the mortgages also. Therefore, we find that the claim is not barred by limitation.

13. The apparent argument of the learned counsel for the appellant, apart from alleging that the suit is barred by limitation, is that if the contentions of the first defendant are accepted, it will be seen that the statement of accounts produced by the plaintiff showing the respective balances as on the date of suit is not correct. Learned counsel elaborated his argument by contending that when the accounts produced by the bank is tainted in the sense that it includes promissory notes which are barred by limitation, it is not a true statement of accounts and hence the plaintiff has not been successful in proving the acceptability of every one of the transactions and hence the amount actually due will vary resulting in a dismissal of the suit itself. To bolster up the above argument, learned counsel also pointed out that in respect of a cheque No.896733 dated

9.5.1974 submitted by first defendant for collection after realising the amount covered by the cheque, the major part of it was credited in the account of the second defendant and hence, as the bank was obliged to account the entire amount in his account, on that score also the plaint claim varies which automatically should result in dismissal of the suit. In the written statement the specific plea in this respect is raised in paragraph 10. It is averred therein that only a petty sum of Rs.7,835.42 was adjusted in his loan account and the Manager was not entitled to appropriate the balance amount in the account of the second defendant.

14. Learned counsel for the bank contended that appropriation of the amount covered by the cheque is perfectly legal especially in the light of the fact that the first defendant had not given any specific directions to the bank manager for the appropriation of the said amount and hence the manager has acted only legally. It is also pointed out that the first defendant is a co-obligant as far as the loan transactions entered into by the second defendant with the plaintiff bank and there were outstanding liability as on the date of collection of the cheque in respect of both these accounts and hence there is no illegality in such adjustment. We find that the argument of the learned counsel for the appellant cannot be accepted at all. As regards the appropriation of amount, no cogent evidence is there to show that he had

given definite instructions to the Manager. It is further to be pointed out that gong by the express provisions of Section 60 of the Contract Act, there is no illegality in the method adopted by the bank. Section 60 of the Contract Act is extracted below:

> "60. **Application of payment where debt to be discharged is not indicated.--** Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitations of suits."

It is clear from the above provision that when there is no intimation from the debtor as to how the payment is to be made, it is at the discretion of the creditor to apply it to any lawful debt actually due and payable from the debtor. It is not disputed that the first defendant was liable for the amount due from the second defendant also in respect of the loan transactions availed by the second defendant. Therefore, we find that there is no illegality in the appropriation made by the bank. At any rate, there is no counter claim raised by the first defendant as far as this item of amount is concerned, as rightly found by the court below.

15. Next item is the amount covered by the fixed deposits dated 10.1.1980 for Rs.31,600/- and dated 20.10.1980 for Rs.27205/- and the interest due on them to the tune of Rs.1,195/-. It is submitted by the learned counsel for the bank that these fixed deposits remained with the bank and it is not a case where there was any instructions from defendants 1 and 2 that the bank would adjust the same in the loan account. Further, the bank is entitled to adjust the same at the time of execution and at any rate, the bank cannot be faulted for non-appropriation. Learned counsel for the appellant pointed out that the plea is that since the bank has not taken into account the amounts covered by the fixed deposits while totalling the plaint claim, the claim itself is defective which will entail a dismissal of the suit. We find that the said argument is not acceptable. The suit is filed based on the balance in the accounts maintained by the bank and merely because of the fact that the bank can appropriate itself any other securities available with the bank as on the date of suit, it will not result in the plaint claim being defective. As rightly pointed out by learned counsel for the bank, when a decree is sought to be executed, the bank can make available the security also. It is therefore not correct to say that the total liability as on the date of suit stands reduced automatically by the amount covered by the fixed deposits and therefore the suit will have to be dismissed on that score.

16. The main grounds argued in the appeal are as above. The plaintiff has produced in support of the claim Exts.A1 to A120. The defendants have not been able to disprove the acceptability of the accounts by any documentary evidence to the contra. Oral evidence of the plaintiff is by way of deposition of P.Ws.1 and 2. P.W.1 who was the clerk and cashier in the Balaramapuram branch of the bank at the time when the transactions were entered into, have stated in detail the facts in support of the plaint claim. A reading of the deposition will also show that the appellant and other defendants were not successful in pointing out any defects in the statement of accounts. We have not been taken to any part of the oral evidence to show that the claim is defective.

17. As rightly pointed out by learned counsel for the respondent bank, what is challenged in the appeal is only the liability of the first defendant in respect of the amount of Rs.2,54,861/-. In the valuation along with the memorandum of appeal it is shown as Rs.2,54,861/- as the amount due from the appellant and the court fee is shown as Rs.25,481/- to be levied under Section 22 of the Court Fees Act. It is true that going by Rules 4 and 33 of Order 41, the appellate court is having every power to reverse the decree against non-appealing defendants also. The question is whether in the circumstances the appeal should be considered as an appeal against

the entire amount decreed. We find that the learned counsel for the bank is correct is pointing out that the appeal is confined only to the amount of Rs.2,54,861/- going by the valuation.

18. The arguments raised by the learned counsel for the appellant as regards the promissory notes executed in respect of the transactions undertaken by him are similar in respect of the transactions entered into in respect of the loans and other transactions entered into by the second defendant also. There also Ext.A47 is the renewal promissory note and Ext.A48 is the covering letter executed on the same date. So, is the case with Ext.A52 and A54. Ext.A59 and A61 bearing the same date. Ext.A65 renewal promissory note is dated 16.6.1978 and A66 is the covering letter signed by the 2nd defendant and others on the same date. As regards those transactions also, we find that fresh promissory notes have been executed along with covering letters which reflected acknowledgment of the liability. Therefore, as regards the loan transactions undertaken by the second defendant also, even though learned counsel for the appellant points out that some of the promissory notes are barred by limitation as on the date of the suit, since fresh promissory notes have been executed and the suit has been filed within three years from the date of such promissory notes, it is not barred by limitation. The reasons we have adopted in respect of the

transactions undertaken by the appellant will squarely apply here also. Therefore, on that score the appellant is not correct in his arguments that the claim raised by the plaintiff for realising an amount of Rs.5,00,658.25 in respect of the various facilities available by the second defendant is also unsustainable.

We find that the plaintiff has succeeded in proving the plaint claim as against the defendants. Hence, the appeal is dismissed confirming the decree and judgment of the court below, without any order as to costs.

(Kurian Joseph, Judge.)

(T.R. Ramachandran Nair, Judge.)

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Kurian Joseph &
T.R. Ramachandran Nair, JJ.

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A.S.NO. 389 of 1991

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JUDGMENT

7th August, 2007